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MANDATORY ARREST AND NO-DROP POLICIES: VICTIM EMPOWERMENT IN DOMESTIC VIOLENCE CASES

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Abstract: In recent decades, arrest and prosecution have been applied to perpetrators of domestic violence with increasing severity, representing an important step in recognizing domestic violence as a crime. Some jurisdictions have taken the war against domestic violence a step further, by employing aggressive “mandatory arrest” and “no-drop prosecution” policies. These policies have been met with mixed reactions from advocates of battered women and law enforcement agencies, who debate the effectiveness of the policies, both in curbing crime and in treating the needs of victims. This Note analyzes whether and to what extent specific aggressive arrest and prosecution policies are compatible with a victim-centered empowerment approach to domestic violence advocacy. It concludes by recommending various compromise approaches, which treat domestic violence as the crime that it is while at the same time empowering victims to become survivors.

INTRODUCTION

The modern campaign against domestic violence as we know it has been waged since 1962.¹ The year is 2002 and the statistics are still appalling. An estimated two million American women² are vic-

* Editor in Chief, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2002–2003).

¹ Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present*, reprinted in *BATTERED WOMEN AND THE LAW* 10 (Clare Dalton & Elizabeth M. Schneider eds., 2001).

² The author recognizes both the tragedy of domestic violence as a very real problem in lesbian, gay, bisexual, and transgender relationships, and the fact that victims are not always women and that perpetrators of domestic assault are not always men. See Amy Adgington, *Anyone But Me*, reprinted in *BATTERED WOMEN AND THE LAW*, *supra* note 1, at 134; DAVID ISLAND & PATRICK LETELLIER, *MEN WHO BEAT THE MEN WHO LOVE THEM* (1991), reprinted in *BATTERED WOMEN AND THE LAW*, *supra* note 1, at 148, 149; *About the Newsletter*, NETWORK NEWS, Fall/Winter 2001, at 2. Nonetheless, because 85% percent of domestic violence victims are, in fact, women, with 95% of the perpetrators men, this Note will primarily use language that reflects these statistics. See Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1224, n.4 (2001). The intention is not to ignore or silence those who do not match with traditional depictions of victims and perpetrators.

tims/survivors³ of domestic violence at the hands of their male partners.⁴ More women seek medical attention for harm suffered at the hands of an intimate partner than for injuries caused by auto accidents, rapes, and muggings combined.⁵ Women are more likely to be beaten, raped, or killed by a current or former male partner than by anyone else.⁶ Between 22 and 35% of female emergency room patients are there because of injuries inflicted on them by their partners.⁷ One out of four pregnant women has a history of being abused.⁸ One-third to one-half of female homicide victims were murdered by a male partner.⁹

Clearly, domestic violence is a deeply entrenched problem in American society.¹⁰ As activists step up the campaign for reform on all fronts, it has become accepted within the feminist community that partnership with state law enforcement agencies is an essential component of efforts to eradicate domestic violence.¹¹ Traditionally, acts of violence in the home were largely ignored by law enforcement, who viewed domestic violence as a "private" matter, inappropriate for

Rather, this language is used out of respect for the large number of women who have suffered at the hands of men over the course of history, whose voices were silenced by gender discrimination. See Pleck, *supra* note 1, at 14. Furthermore, the author recognizes that the dynamics of battering in same-sex relationships, while in many ways similar to battering in heterosexual relationships, do have certain nuances that could simply not be done justice as a side note in this Note. See CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 133 (2001). Rather, the role of law enforcement in gay, lesbian, bisexual, and transsexual relationships would warrant separate discussion in a future Note devoted specifically to this subject. See *id.*

³ The terms "victim" and "survivor" will be used interchangeably throughout this Note to recognize both the pain inflicted within the domestic setting by intimate partners as well as the resilience that these "victims" show in surviving their abuse. See DALTON & SCHNEIDER, *supra* note 2, at 3; Edward Gondolf & Ellen Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness*, reprinted in *BATTERED WOMEN AND THE LAW*, *supra* note 1, at 107, 108.

⁴ DALTON & SCHNEIDER, *supra* note 2, at 5. These statistics were compiled by the American Medical Association (AMA) and refer to the number of women who have been the victims of "severe assault" by their partners. *Id.* According to the AMA, the actual incidence is probably double that found through research, making the number of victims a probable four million women in the United States alone. *Id.*

⁵ Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 8 (1999); Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 385-86 (2001).

⁶ Epstein, *supra* note 5, at 8.

⁷ *Id.* at 7-8; Kirsch, *supra* note 5, at 385-86.

⁸ Kirsch, *supra* note 5, at 385.

⁹ *Id.* at 386.

¹⁰ DALTON & SCHNEIDER, *supra* note 2, at 5.

¹¹ Pleck, *supra* note 1, at 11, 16.

state intervention.¹² If domestic violence is to be eradicated, then it must be taken as seriously as other criminal offenses by law enforcement agencies, which must commit to ending this practice and bringing perpetrators to justice.¹³ Without the cooperation and activism of police officers, prosecutors, and judges, the state sends a message to would-be perpetrators and victims that battering is condoned by the state and that it will be permitted without repercussion.¹⁴

That there should be some level of partnership between domestic violence activists and law enforcement is as far as the consensus goes, however.¹⁵ In recent years, a heated debate has ensued within both the feminist and law enforcement communities as to the most appropriate way for law enforcement to assist in the struggle to end domestic violence.¹⁶ To the frustration of police officers and state prosecutors, domestic violence victims are often "uncooperative" in the state's efforts to prosecute and convict their batterers.¹⁷ Many states have responded to both the traditional failure of law enforcement to react to violence in the home and the frequent lack of cooperation by victims by adopting "mandatory arrest" and/or "no-drop prosecution" policies.¹⁸ Mandatory arrest policies completely remove police discretion and require arrest in all cases where officers have probable cause to believe that an act of domestic violence has occurred.¹⁹ No-drop policies require prosecution of a domestic violence perpetrator, regardless of the victim's wishes, and often force the victim to participate in the

¹² EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 6 (2d ed. 1996).

¹³ ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 44 (2000).

¹⁴ See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 *BUFF. CRIM. L. REV.* 801, 850-51 (2001); James Ptacek, *Why Do Men Batter Their Wives?*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 133, 155 (Kersti Yllö & Michelle Bograd eds., 1990).

¹⁵ Compare Eve S. Buzawa & Carl G. Buzawa, *Arrest is No Panacea*, reprinted in *BATTERED WOMEN AND THE LAW* *supra* note 1, at 603, 604, with Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, reprinted in *BATTERED WOMEN AND THE LAW* *supra* note 1, at 623, 623.

¹⁶ *Id.*

¹⁷ See Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, in *WOMAN BATTERING: POLICY RESPONSES* 95, 100 (Michael Steinman ed., 1991); Casey G. Gwinn & Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and Prosecutor*, reprinted in *BATTERED WOMEN AND THE LAW*, *supra* note 1, at 628, 628. There are numerous reasons why a battered woman might decide not to participate in the prosecution of her batterer or even demand his arrest. See *infra* notes 41-50 and accompanying text.

¹⁸ See Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 *HARV. L. REV.* 550, 557 (1999).

¹⁹ Vito Nicholas Ciraco, *Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey*, 22 *WOMEN'S RTS. L. REP.* 169, 170 (2001).

prosecutorial process.²⁰ While too little state intervention can be extremely detrimental to the safety of victims, too much intervention in the form of mandatory arrest and no-drop prosecution may intrude upon the autonomy of victims in a way that calls the appropriateness of these policies into question.²¹

This Note analyzes whether mandatory arrest and no-drop policies are compatible with the best interests of domestic violence victims.²² Part I explains the empowerment model of advocacy and its importance to feminists in the movement to end domestic violence.²³ The remainder of the Note operates under the assumption that the empowerment model is the best way to serve most victims of domestic violence.²⁴ Part II examines the public roles and duties of police officers and prosecutors to determine whether and to what extent a concern for the best interests of victims should factor into those roles. After clarifying the role of empowerment in the missions of law enforcement agencies and actors, Part III analyzes the compatibility of both mandatory arrest and no-drop policies to a victim-empowerment approach to domestic violence.²⁵ Part IV then suggests alternatives to both policies that will better balance criminal accountability and victims' interests.

Most academic scholarship has considered mandatory arrest and no-drop policies together as either jointly empowering or disempowering of domestic violence victims. While the two policies are complementary to one another and operate as two stages in the same process, it does not follow that one cannot exist without the other.²⁶ This

²⁰ Chiu, *supra* note 2, at 1231.

²¹ Mills, *supra* note 18, at 611-12.

²² See Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 621-22 (2000).

²³ See 1 Lois H. Kanter & V. Pualani Enos, Domestic Violence Manual, 149 (2001) (unpublished manuscript, on file at the Domestic Violence Institute at Northeastern University School of Law, in the law school's clinical offices in Boston, Massachusetts.) The manual is distributed to law student and professional advocates who serve domestic violence victims through one of the Institute's many clinical programs.

²⁴ See JUDITH LEWIS HERMAN, M.D., TRAUMA AND RECOVERY 133 (1997); Jones, *supra* note 22, at 621; Mills, *supra* note 18, at 604; Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 62 (2000); Kanter & Enos, *supra* note 23, at 149.

²⁵ This Note does not address the "effectiveness" of mandatory policies in ending domestic violence, but only the compatibility of the empowerment model with prosecution strategies.

²⁶ See Cahn & Lerman, *supra* note 17, at 96. (In arguing that arrest and prosecution should work together to be effective, the authors point out cases where this does not happen, demonstrating that the two can exist independently of one another.)

leaves open the possibility that one policy is compatible with victim empowerment, while the other is not. This Note addresses mandatory arrest and no-drop prosecution policies individually, analyzing each on its own terms, while remaining mindful of their intersections throughout.

I. THE VICTIM-EMPOWERMENT MODEL OF DOMESTIC VIOLENCE ADVOCACY

Approaches to victims of domestic violence can generally be divided into two categories: directive and empowering.²⁷ The directive model is most closely aligned with the traditional approach to lawyering employed by most attorneys.²⁸ Under that model, the advocate tells her client what she ought to do given the lawyer's assessment of the client's situation.²⁹ The empowerment model is quite contrary to the traditional style of lawyering employed by the directive model.³⁰ Under the empowerment model, the client is the decision-maker.³¹ The advocate simply provides information in a setting that is safe and conducive for contemplation, and ultimately allows the client to decide what to do with her situation.³²

The empowerment model, while perhaps not appropriate for all forms of lawyering, is particularly well suited to working with victims of domestic violence.³³ This is best understood by looking at the dy-

²⁷ See HERMAN, *supra* note 24, at 133.

²⁸ DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH* 17-18 (1991).

²⁹ *Id.*

³⁰ *Id.* at 17 (using a "client-centered" model to refer to the same concept as the "empowerment model" discussed here); Kanter & Enos, *supra* note 23, at iv. (including Binder's "client-centered" model in a broad section on the "empowerment model").

³¹ Kanter & Enos, *supra* note 23, at 151.

³² *Id.*

³³ See HERMAN, *supra* note 24, at 133. Herman's critical book *Trauma and Recovery*, while written from the therapy perspective, has been widely adopted by domestic violence legal advocates to explain and justify the empowerment model. See DALTON & SCHNEIDER, *supra* note 2, at 1071; Jones, *supra* note 22, at 621. The following passage provides a summary of Herman's approach:

The first principle of recovery is the empowerment of the survivor. She must be the author and arbiter of her own recovery. Others may offer advice, support, assistance, affection and care, but not cure. Many benevolent and well-intentioned attempts to assist the survivor founder because this fundamental principle of empowerment is not observed. No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest.

dynamic of abuse present in a battering relationship.³⁴ Domestic violence is not simply about men hitting women and injuring them physically.³⁵ A batterer is generally not trying to hurt the woman he batters only to cause injury,³⁶ but to dominate her so as to gain power and control over every facet of her life.³⁷ The violence is used by a batterer as a tool to instill fear in his victim.³⁸ This fear, kept fresh by renewed incidents of violence, is what allows a batterer to exercise power and control over his victim, often over a long period of time.³⁹

Women and men stay in abusive relationships for a myriad of complex and often logical reasons,⁴⁰ including, but not limited to, the following: the financial dependency of the victim on her batterer;⁴¹ fear (often based on threats) that the batterer will get custody of the children if she tries to leave him;⁴² fear that he will have her deported if she is an undocumented immigrant;⁴³ cultural or religious mores

HERMAN, *supra* note 24, at 133.

³⁴ See HERMAN, *supra* note 24, at 136.

³⁵ DALTON & SCHNEIDER, *supra* note 2, at 57; David Adams, M.Ed., *Identifying the Assaultive Husband in Court: You Be the Judge*, BOSTON BAR J. 23, 24 (July/August 1989).

³⁶ See NEIL S. JACOBSON, PH.D. & JOHN M. GOTTMAN, PH.D., WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 67 (1998).

³⁷ DALTON & SCHNEIDER, *supra* note 2, at 57.

³⁸ *Id.* at 56.

³⁹ *Id.*

⁴⁰ See Kanter & Enos, *supra* note 23, at 122.

⁴¹ SCHNEIDER, *supra* note 13, at 43. As part of his effort to control his victim, a batterer will often make sure that he takes care of all financial arrangements in the household. Karla Fisher et al. *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2121 (1993); see LINDA G. MILLS, THE HEART OF INTIMATE ABUSE 23 (1998).

⁴² SCHNEIDER, *supra* note 13, at 43; Adams, *supra* note 35, at 23. Massachusetts has taken the step of making domestic violence a relevant factor in custody disputes, requiring written findings of fact where custody is assigned to an abusive parent, whether or not the violence was targeted towards the children. See *The Custody of Vaughn*, 664 N.E.2d 434, 440 (Mass. 1996). However, not all states have taken this step, and in those jurisdictions, courts continue to argue that domestic violence committed by one parent against the other is irrelevant to the determination of custody. DALTON & SCHNEIDER, *supra* note 2, at 366. Some courts even go so far as to criminally prosecute battered women who "fail to protect" their children from violence perpetrated by the children's father. See Michelle Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, reprinted in BATTERED WOMEN AND THE LAW, *supra* note 1, at 306. Women have been found culpable for their children's abuse even when the perceived "failure to act" was posited on threats by the batterer that action by the mother would result in additional or more grievous harm to the children. See V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, reprinted in BATTERED WOMEN AND THE LAW *supra* note 1, at 320.

⁴³ Since 1994, there are now legislative provisions that allow a battered immigrant woman who is married to her batterer to file for permanent resident status on her own.

that would condemn her for leaving the relationship;⁴⁴ fear that leaving would heighten her physical danger;⁴⁵ fear for the welfare of family members;⁴⁶ lack of networks, friends, or other sources of emotional support;⁴⁷ a belief that she is incompetent and needs her batterer to survive in the world;⁴⁸ the belief that she "deserves" to be abused because of her own imperfections or behavior;⁴⁹ and finally, love for her abuser.⁵⁰

Protections for Battered Immigrant Women and Children, Pub. L. No. 103-322(G), 108 Stat. 1953.

⁴⁴ NICKY ALI JACKSON & GISELÉ CASANOVA OATES, VIOLENCE IN INTIMATE RELATIONSHIPS: EXAMINING SOCIOLOGICAL AND PSYCHOLOGICAL ISSUES 233-34 (1998).

⁴⁵ Adams, *supra* note 35, at 23. This has proven to be a very well-founded fear. *Id.* Studies show that a battered woman is often in the most danger from her batterer when she tries to leave. *Id.* This is because leaving is a sign to the batterer that his control over her has been threatened, and he might be inclined to lash out at her with an even greater show of force than before to regain that control or to retaliate against her. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 129 (1992).

⁴⁶ See Fisher et al., *supra* note 41, at 2117, 2122. A batterer might increase his control by threatening not only his victim but also those close to her. *Id.* This is a powerful controlling tool because a woman might endure a great deal more battering than she otherwise would if she feels that she would put her loved ones in danger by leaving. *See id.*

⁴⁷ Adams, *supra* note 35, at 24. By isolating his partner from her friends, family, and other support networks, an abuser increases his victim's emotional dependency on him, thereby shutting out voices of encouragement and reason that might come from people who care. *Id.*; see also Fisher et al., *supra* note 41, at 2132.

⁴⁸ See Roddy Doyle, *The Woman Who Walked Into Doors*, reprinted in BATTERED WOMEN AND THE LAW *supra* note 1, at 69. Some batterers go so far as to play mind games with their victims to try to convince them that they are "crazy" and are unable to survive without the abuser. See JACOBSON & GOTTMAN, *supra* note 36, at 79. These tactics often incorporate a denial of past abuse. *Id.* at 78.

⁴⁹ Adams, *supra* note 35, at 24. Intimate abuse very frequently includes verbal and emotional abuse, where the batterer attacks the self-esteem of his victim with insults, name calling, and profanity. *Id.* After a period of time, this barrage wears away at a battered woman's sense of self worth. *Id.* Particularly if her contact with other, more positive, voices is limited she begins to believe what her partner says about her. *Id.* She might even come to believe that she brings the abuse upon herself by not behaving appropriately or by not being "good enough." See Doyle, *supra* note 48, at 69; see also Fisher et al., *supra* note 41, at 2132.

⁵⁰ See Fisher et al., *supra* note 41, at 2140. In order to understand this final reason that a woman will stay with her abuser, it is important to understand that domestic violence often happens in a cyclical pattern. See Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds*, reprinted in BATTERED WOMEN AND THE LAW, *supra* note 1, at 65. That is, batterers generally are not always violent. *See id.* Certainly in the beginning of the relationship, many victims report that the man who later became an abuser was often the most "romantic and attentive lover" that she had ever dated. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 40 (1988). By the time the violence begins (often after marriage, pregnancy, or some other sign of commitment), the woman is in love with her batterer. *Id.* at 42. This love, in and of itself, goes a long way toward explaining why a battered woman will try to explain away her abuser's behavior and why she may be quick to offer him a

Given the complexity of the reasons why a battered woman might stay with her abuser, disentangling a victim from her situation is not as simple as picking her up and carrying her to safety.⁵¹ Even the most dedicated advocate is limited in the amount of time and energy that can be devoted to each battered women seeking assistance.⁵² Nor can absolute safety be guaranteed by state protective mechanisms,⁵³ given that incarceration for crimes of domestic violence tends to be for a relatively short period of time.⁵⁴

Not only are state solutions limited, but these solutions might actually do damage to the recovery of a battered woman by replicating the control wielded by the abuser.⁵⁵ When a state or advocate forces a woman to leave or to take other action, rather than empowering her to make these decisions on her own, the state has simply succeeded in transferring power from one controlling entity to another.⁵⁶ This directly undermines the victim's efforts to regain control over her own life by communicating to her that the batterer was right all along—that she is incompetent and incapable of surviving on her own.⁵⁷

Alternately, when control is held by a survivor, she begins to realize that she *is* competent, that she is *not* crazy, and that she has worth.⁵⁸ A battered woman does not regain her autonomy by having others continue to make decisions for her; she regains her autonomy by making decisions for herself.⁵⁹ Thus, those persons and agencies seeking to help a victim of domestic violence can best meet her needs

"second chance." *Id.* at 50. Even after the first incident of violence, future incidents often happen in a cyclical nature, referred to as the "cycle of violence." Walker, *supra*, at 65. Under this model, violence is followed by a period of calm, often called the "honeymoon phase," during which time the batterer will lavish gifts on his partner and make intense promises never to harm her again. Kanter & Enos, *supra* note 23, at 91.

⁵¹ MILLS, *supra* note 41, at 213.

⁵² HERMAN, *supra* note 24, at 149.

⁵³ MILLS, *supra* note 41, at 213.

⁵⁴ See 2 Lois H. Kanter & V. Pualani Enos, Domestic Violence Manual, 215 app. 2 (2001) (unpublished manuscript, on file at the Domestic Violence Institute at Northeastern University School of Law, in the law school's clinical offices in Boston, Massachusetts). In Massachusetts, maximum commitment to the house of corrections or to jail is two and a half years for assault or assault and battery. MASS. GEN. LAWS ch. 265, § 13 (A) (2000).

⁵⁵ See Mills, *supra* note 18, at 554.

⁵⁶ See *id.*

⁵⁷ See *id.* at 589.

⁵⁸ *Id.* at 605; Winick, *supra* note 24, at 64.

⁵⁹ See Mills, *supra* note 18, at 605; Winick, *supra* note 24, at 63–64.

by empowering her to make these decisions, rather than by dictating solutions.⁶⁰

New life decisions may not come quickly. Afterall, “[a] woman experiencing what may [be] her lowest and most vulnerable time must face tasks daunting to a person in ideal conditions.”⁶¹ The survivor must, therefore, be permitted to work towards her freedom at a pace that is acceptable to her and that increases her sense of autonomy with each step she takes.⁶²

Critics of the empowerment model question the ability of a battered woman to make her own decisions because she is being “coercively controlled” in the relationship and is hence viewed as incapable of assessing her own needs.⁶³ While this may apply to some battered women, evidence instead shows a great deal of rational behavior among victims of domestic violence.⁶⁴ The rationality of this behavior has a tendency to be overlooked, however, by persons who are unfamiliar with the long list of reasons why a woman might stay in an abusive relationship.⁶⁵

In many situations, a decision to stay is not a result of “helplessness”⁶⁶ so much as a conscious choice that the risks of leaving out-

⁶⁰ See Mills, *supra* note 18, at 605; Winick, *supra* note 24, at 62, 63–64.

⁶¹ Kanter & Enos, *supra* note 23, at 121.

⁶² See *id.* at 166.

⁶³ See Jones, *supra* note 22, at 612, 631 (illustrating how far a directive model might be taken, by suggesting that guardianship is the best way to handle some domestic violence victims). Jones’s approach represents the antithesis of the empowerment approach, in which a judge would be encouraged to declare an adult battered woman incompetent to make life choices for herself, and could then appoint a family member or friend as her guardian, essentially stripping the victim of all legal autonomy until such a time as her choices fall more closely in line with what the court wants for her. Compare *id.* at 642, with Kanter & Enos, *supra* note 23, at 151. Jones even discusses a court decision, *In Re Conservatorship of Barbara J. Frarck*, in which a woman’s guardianship was awarded to someone else, largely based on her decision to remain with her batterer. 1993 WL 139537; Jones, *supra* note 22, at 641–42. The judge in this case ignored the very rational reasons why this woman might have chosen to live with her boyfriend, and instead declared her choice to be evidence of her irrationality. Jones, *supra* note 22, at 641–42; see discussion *supra* notes 41–50 and accompanying text. This outrageous solution to domestic violence would feature friends and family members, rather than the state, as replicators of an abuser’s control over a battered woman, thus further reinforcing the batterer’s message that she is incompetent and incapable of making choices for herself. See Jones, *supra* note 22, at 644–45.

⁶⁴ See Chiu, *supra* note 2, at 1259–60.

⁶⁵ See *id.*; *supra* notes 41–50 and accompanying text.

⁶⁶ LENORE E. WALKER, *The Psychological Theory of Learned Helplessness*, in *THE BATTERED WOMAN* 73 (1979). In this controversial and widely repudiated book, Walker based her assessment of battered women as “passive” and “submissive” and “helpless” on studies of dogs given electrical shocks in cages who, after a time, did not leave their cages to escape, even when the doors were eventually opened. *Id.* at 73–74. Walker responded to critics in

weigh the benefits.⁶⁷ A 1992 study found that of the 31 help-seeking strategies described to battered women in the study, the women had tried an average of 13 of these strategies.⁶⁸ This study challenges characterizations of domestic violence victims as passive and incapable of self-help by showing that battered women continue over time to seek help, even though doing so often results in increased violence.⁶⁹

Proponents of the directive model focus ostensibly on the safety of the victim, with the presumption that "leaving" is the safest thing a woman can do.⁷⁰ The fatal flaw in this analysis, however, is that these directive model theorists neglect the overwhelming evidence that a battered woman is often in the greatest amount of danger when she attempts to leave the abusive relationship.⁷¹ While no one can predict with 100% accuracy when a batterer may turn lethal, the person best equipped to make this determination is probably not a prosecutor or a divorce attorney, but the victim herself.⁷² Because a survivor of domestic violence knows her batterer best, she is best able to gauge when his words, expressions, and tone of voice indicate that she is in danger.⁷³ And ultimately, she will bear the consequences of underestimating him.⁷⁴

The empowerment model recognizes that some of the choices presented in domestic violence cases are simply too important and

1993 by reframing her "learned helplessness" theory in a discussion of battered women's syndrome (BWS), as a subcategory of post traumatic stress disorder (PTSD). DALTON & SCHNEIDER, *supra* note 2, at 117, n.1. BWS has been used as a defense for women who killed their batterers and as an explanation offered by expert testimony in trial as to why a battered woman might recant her original testimony and side with her batterer. *People v. Humphrey*, 13 Cal. 4th 1073, 1097 (Cal. 1996); *Connecticut v. Borelli*, 629 A.2d 1105, 1114 (Conn. 1993). BWS has, on the one hand, been useful to give scientific credence to domestic violence theories. DALTON & SCHNEIDER, *supra* note 2, at 211. On the other hand, the use of BWS is now seen by many domestic violence advocates and scholars as unfortunate in that it has the tendency to explain what could very well have been a rational response by a battered woman in "terms that imply abnormality and illness." *Id.*

⁶⁷ See Chiu, *supra* note 2, at 1259-60; Jill Davies, *Batterer Generated Risks*, reprinted in Kanter & Enos, *supra* note 23, at 203-05.

⁶⁸ Fisher et al., *supra* note 41, at 2135-36. The help-seeking strategies inquired about in this study included: "talking to the abuser about the abuse, consulting family and friends, calling the police," leaving the abuser, seeking counseling, and seeking legal advice. *Id.* at 2136.

⁶⁹ *Id.*

⁷⁰ See Jones, *supra* note 22, at 617.

⁷¹ See Adams, *supra* note 35, at 23.

⁷² See Kanter & Enos, *supra* note 23, at 195.

⁷³ See *id.*; JACOBSON & GOTTMAN, *supra* note 36, at 72-73.

⁷⁴ Kanter & Enos, *supra* note 23, at 151.

too difficult to be made by an advocate with little personally at stake.⁷⁵ When legal options cannot guarantee, and may even jeopardize safety, the victim must be informatively and supportively empowered to make the tough calls for herself.⁷⁶

Reliance on the battered woman to assess her own safety does not mean that activists and state actors have no role in this process.⁷⁷ Within the empowerment model there is a very important role for these actors to present a battered woman with options and scenarios that she may not have considered on her own.⁷⁸ An advocate might even challenge a woman's assessment of her situation and still be operating within the empowerment model approach, so long as the final decision is left to the survivor.⁷⁹

Finally, it should be noted that in very limited situations, more state intervention might be warranted.⁸⁰ This kind of intervention would be appropriate, for example, in cases where a victim of domestic violence suffers from an identifiable mental illness, as diagnosed by a trained clinician,⁸¹ that truly prevents her from making decisions on her own behalf.⁸² It would not apply to cases where a victim simply makes decisions that others would consider "not in her best interest."⁸³

The victim-empowerment model is widely held by domestic violence experts to be the approach that best addresses the needs of battered women and men.⁸⁴ Given that empowerment is the preferred approach for dealing with victims, the next question is whether and to what extent the best interests of victims, defined generally here as their need to be empowered, should factor in as a concern of police officers and prosecutors in the state system.

⁷⁵ See *id.* at 195.

⁷⁶ See MILLS, *supra* note 41, at 213–14.

⁷⁷ See Kanter & Enos, *supra* note 23, at 195.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See Mills, *supra* note 18, at 607–08.

⁸¹ See *id.* at 608.

⁸² See *id.* at 607–08.

⁸³ See *id.*

⁸⁴ See HERMAN, *supra* note 24, at 133; Kanter & Enos, *supra* note 23, at 151. In their manual, which is distributed to law student advocates working with Northeastern University School of Law's Domestic Violence Institute Clinics, professors Lois Kanter and Pualani Enos state that "[t]he most lasting, effective advocacy for battered women is based on the empowerment model," and "[c]lient empowerment' . . . remains an important principle which advocates must understand and adopt." Kanter & Enos, *supra* note 23, at 149, 151.

II. THE FUNCTIONS AND RESPONSIBILITIES OF THE POLICE AND PROSECUTORS: HOW DO VICTIMS FACTOR IN?

A. *The Police*

The oath taken by a police officer is one taken "to the public."⁸⁵ Until recent years, police officers generally did not treat domestic violence victims as part of the "public" that they were sworn to protect.⁸⁶ Historically, the state classified domestic violence as a "private" issue that was inappropriate for intervention by law enforcement agencies.⁸⁷

Feminists have been successful in demonstrating the discriminatory way in which such a public/private divide allows men to abuse women and children in their homes without fear of sanction.⁸⁸ As a result, the notion of domestic violence as a "private" issue has been largely discredited.⁸⁹ Thus, the responsibility of police officers to the public has been expanded to include a responsibility to protect private citizens, which includes victims of domestic violence.⁹⁰

More specifically, since 1977 nearly all states have codified a greater concern for domestic violence victims within specific domestic violence statutes that affect the roles of police officers.⁹¹ These stat-

⁸⁵ See Jennifer Hagan, Note, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 973 (2001).

⁸⁶ See *id.* at 974-75.

⁸⁷ See *Bradley v. State*, 1 Miss. 156, 158 (1824). According to the Supreme Court of Mississippi at the time of this case,

Family broils and dissensions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy. To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, . . . and use salutary restraints in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.

Id. Although *Bradley* was overruled by *Harris v. State* in 1894, husbands in many states have enjoyed immunity from civil suits by their wives until only recent years. *Harris v. State*, 71 Miss. (1 Walker) 462, 464 (1893). For example, Missouri did not explicitly abolish the doctrine of interspousal immunity until 1986, and the doctrine continues to endure in Georgia and Louisiana. *Townsend v. Townsend*, 708 S.W.2d 646, 650 (Mo. 1986); Clare Dalton, *Domestic Violence, Domestic Torts, and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 324 (1997).

⁸⁸ See Pleck, *supra* note 1, at 13-14.

⁸⁹ See Hagan, *supra* note 85, at 974-75.

⁹⁰ See *id.* at 973, 975.

⁹¹ See BUZAWA & BUZAWA, *supra* note 12, at 121.

utes vary from state to state, but many incorporate the needs of victims into law enforcement functions by re-articulating the elements of domestic violence crimes,⁹² allowing warrantless arrest in cases of suspected domestic violence,⁹³ and requiring that police officers take affirmative measures to educate victims about their legal rights.⁹⁴ Through statutory enactment, attention to the interests of domestic violence victims has become deeply entrenched in the official mandate of police forces around the country.⁹⁵

B. Prosecutors

The prosecutor plays many roles in the American criminal justice system.⁹⁶ According to *ABA Standards* 3-1.2(b), the prosecutor is simultaneously an "administrator of justice, and an advocate, and an officer of the court . . ." In balancing these many roles, there is a general consensus that the prosecutor is primarily responsible in the execution of her duties to the interests of society as a whole.⁹⁷ The National Prosecution Standards clearly articulate the primacy of the public over the individual interest:

The prosecutor should at all times be zealous in the need to protect the rights of individuals, but must place the rights of society in a paramount position in exercising prosecutorial discretion in individual cases and in the approach to the

⁹² *Id.* at 124. Generally, domestic violence crimes could be charged as assault and battery under previously existing laws. *Id.* However, other common elements of abusive relationships such as harassment, intentional infliction of emotional distress, or threats are not easily prosecuted when responding police officers classify the case as a case of assault and battery. *Id.* Combining the elements of these above crimes into one domestic violence statute enhances the police response to domestic violence by honing law enforcement officers' understanding of domestic violence. *Id.* Furthermore, by collapsing the elements of domestic violence crimes into one statute, police departments have a tendency to respond affirmatively, with the recognition that they face an increased possibility of civil liability for failure to enforce the statute. BUZAWA & BUZAWA, *supra* note 12, at 124.

⁹³ *Id.* at 123.

⁹⁴ *Id.* at 126. Some such statutes require police officers to give victims written information regarding protective options under the laws of the state. *See id.*

⁹⁵ *See id.* at 121.

⁹⁶ ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2(b) (3d ed. 1993) [hereinafter ABA STANDARDS].

⁹⁷ Attorney Gen. v. Nathan Tufts, 239 Mass. 458, 489 (1921); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13, reprinted in PROFESSIONAL RESPONSIBILITY, STANDARDS, RULES & STATUTES (John S. Dzienkowski ed., 2000) [hereinafter MODEL CODE]; NAT. PROSECUTION STANDARDS 1.3 (Nat'l Dist. Attorney's Ass'n, 2nd 1991).

larger issues of improving the law and making the law conform to the needs of society.⁹⁸

Nonetheless, even though a victim is not the prosecutor's "client" in the sense that her interests do not dictate a prosecutor's decisions, protecting the interests of victims remains an important part of the prosecutor's job description.⁹⁹ That respect for victim interests constitutes a valid component of a prosecutor's constituency is reflected in the ABA guidelines of professional conduct, the fact that the victim is a particularly vulnerable member of society, and the corresponding realization that many of the victim's interests correlate directly with the interests of society as a whole.¹⁰⁰

ABA *Standard* 3-3.2(h) states that, "Where practical, the prosecutor should seek to insure that victims of serious crimes or their representatives are given an opportunity to consult with and to provide information to the prosecution prior to the decision whether or not to prosecute" While the victim's opinion does not direct the decision to prosecute, this standard assumes that her wishes and views will be considered by a prosecutor.¹⁰¹ *Standard* 3-3.9(b)(v) makes this point more explicitly by listing the "reluctance of a victim to testify" as a valid reason for a prosecutor to exercise her discretion not to prosecute a particular case.¹⁰²

In addition, prosecutors must consider victim interests in the course of protecting the interests of society because domestic violence victims are among the members of society in the greatest need of protection.¹⁰³ This is true because victims of domestic violence are generally at a greater risk for future abuse than are other crime victims due to the intimate nature of the relationship between victim and abuser.¹⁰⁴ Thus, prosecutors have a heightened responsibility in domestic violence cases to consider the safety interests of the victims in the course of carrying out their societal responsibilities.¹⁰⁵

There are also pragmatic reasons for prosecutors to consider the wishes and opinions of domestic violence victims when prosecuting

⁹⁸ NAT. PROSECUTION STANDARDS, *supra* note 97, at 1.3.

⁹⁹ See ABA STANDARDS, *supra* note 96, at 3-3.2(h).

¹⁰⁰ See discussion *infra* Part III.A.3.

¹⁰¹ See ABA STANDARDS, *supra* note 96, at 3-3.2(h).

¹⁰² See *id.* at 3-3.9(b)(v).

¹⁰³ See Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 FORDHAM URB.L.J. 953, 960-61 (2000).

¹⁰⁴ *Id.* at 961.

¹⁰⁵ See *id.* at 960-61.

their cases. A victim's interests are often compatible with society's overall interest in preserving scarce judicial resources and in encouraging victims to come forward to ask for state assistance in the first place.¹⁰⁶ If victims are generally known to be coerced into participating in the prosecution of their batterers, many victims may decide not to report intimate abuse to the authorities. Reluctance to report violent crime demonstrates a serious loss of public faith in the justice system,¹⁰⁷ an outcome that is against the interests of society as a whole.

Another practical way in which victim interests affect society is in the distribution of scarce judicial resources.¹⁰⁸ Preservation of judicial resources to support the maximum public good is a reality that prosecutors must weigh when considering which cases to prosecute.¹⁰⁹ In a case based solely on victim testimony, it is important for prosecutors to consider the willingness of victims to participate in prosecution.¹¹⁰ This is because state resources might be wasted if the prosecution persists and loses a case where the only witness is unwilling or reluctant to testify.¹¹¹

In conclusion, a prosecutor's primary responsibility is to the public at large.¹¹² However, in representing the interests of society, prosecutors have a duty to consider the interests of victims as a part of that society, and particularly as the part of society most at risk for future victimization.¹¹³ To the extent that prosecutors must show at least some consideration for the best interests of victims, these state actors should incorporate an empowerment model of advocacy into their public roles.¹¹⁴

III. THE COMPATIBILITY OF MANDATORY POLICIES WITH VICTIM EMPOWERMENT STRATEGIES

In concluding that victim empowerment must factor at least partially into the professional responsibilities and goals of law enforcement officers and prosecutors, it is appropriate to examine whether

¹⁰⁶ See BUZAWA & BUZAWA, *supra* note 12, at 178–79.

¹⁰⁷ See *id.* at 179.

¹⁰⁸ See *id.* at 178–79; Kirsch, *supra* note 5, at 417–18.

¹⁰⁹ See BUZAWA & BUZAWA, *supra* note 12, at 178–79; ABA STANDARDS, *supra* note 96, at 3–3.9.

¹¹⁰ See Kirsch, *supra* note 5, at 417–18.

¹¹¹ See *id.* at 417–18.

¹¹² Tufts, 239 Mass. at 489; MODEL CODE, *supra* note 97, at EC 7–13; NAT. PROSECUTION STANDARDS, *supra* note 97, at 1.3.

¹¹³ Vilhauer, *supra* note 103, at 960–61.

¹¹⁴ See *id.*

and to what extent mandatory arrest and no-drop policies empower victims of domestic violence.

A. Mandatory Arrest Policies

Mandatory arrest policies require police officers to arrest a suspect whenever the officer has probable cause to believe that an assault or battery has taken place, whether or not the officer has a warrant or has even witnessed any violence.¹¹⁵ Prior to enacting mandatory arrest laws, most state laws already *permitted* a police officer to make a warrantless arrest in cases where there was probable cause of domestic violence.¹¹⁶ The novelty of the mandatory arrest laws, therefore, is that they remove discretion on the part of police officers who might be otherwise reluctant to arrest suspects in domestic cases.¹¹⁷

A national growth in mandatory arrest policies followed a widely-circulated and controversial 1984 study that linked an increase in arrests in domestic violence cases to decreased recidivism in batterers.¹¹⁸ While mandatory arrest policies have helped to subject domestic violence crimes to greater public scrutiny, these policies were adopted largely out of concern for law enforcement, through decreasing recidivism in batterers, and less out of a concern for victim empowerment.¹¹⁹

Since their inception, mandatory arrest policies have generated enormous controversy among legal analysts and battered women's advocates.¹²⁰ This controversy does not merely center around the empowerment model versus directive model debate.¹²¹ Even within the empowerment camp itself, there is extensive debate as to whether mandatory arrest policies actually empower or disempower battered

¹¹⁵ Ciraco, *supra* note 19, at 170; Mills, *supra* note 18, at 558.

¹¹⁶ Mills, *supra* note 18, at 558.

¹¹⁷ See *id.*

¹¹⁸ See *id.* The study is "controversial," because its validity has been called into question by subsequent efforts to replicate its outcome. BUZAWA & BUZAWA, *supra* note 12, at 117. "Replication studies" failed to corroborate this 1984 "Minneapolis Domestic Violence Experiment" (MDVE). *Id.* The MDVE reported a decrease in violence when measured six months after arrest; however, when replication studies measured violence 11 months after arrest, there was no significant difference in recidivism between the arrest and non-arrested group. *Id.* at 113. Some of these "replication studies" further concluded that arrest actually correlated with an increased level of recidivism among batterers who were unemployed and/or African American. *Id.* at 113, 114.

¹¹⁹ See DALTON & SCHNEIDER, *supra* note 2, at 595-96.

¹²⁰ See *id.* at 596.

¹²¹ See Winick, *supra* note 24, at 79.

women.¹²² Within this controversy, mandatory arrest policies have been characterized in four ways: 1) that they are disempowering because they take away control from victims of domestic violence;¹²³ 2) that they empower victims by showing that the state will support their efforts to leave their batterers;¹²⁴ 3) that mandatory arrest policies do take control away from victims, but that this usurpation of control is warranted while the victim is incapacitated by trauma;¹²⁵ and 4) that this stage in law enforcement is neither empowering nor disempowering because it need not involve the victim at all, but is a matter between the defendant and the state.¹²⁶

1. Mandatory Arrest as Disempowering of Victims

Critics of mandatory arrest argue that the policy disempowers victims of domestic violence by taking away choice from the victim and instituting a penalty on her batterer that she may not desire to impose.¹²⁷ By removing choice from the victim, critics argue that the state replicates the control wielded by the batterer.¹²⁸ This threatens to perpetuate the disempowerment of the victim by sending a message that she is too helpless to survive without the controlling direction of a stronger person.¹²⁹

In addition to this more abstract form of disempowerment, there are specific ways in which mandatory arrest policies can further entrench a victim's vulnerability in the abusive relationship.¹³⁰ For example, when police officers respond to a domestic violence call, it is sometimes difficult to identify the primary aggressor, particularly where both parties allege violence and where both parties exhibit injuries.¹³¹ Many victims of battering relationships fight back in self-defense during at least some incidents of abuse.¹³² Thus, it is not uncommon for a primary aggressor to be physically injured when police

¹²² See *id.*

¹²³ *Id.* at 72–73; see Chiu, *supra* note 2, at 1229; see also *infra* Part III.A.1.

¹²⁴ BUZAWA & BUZAWA, *supra* note 12, at 143; see also *infra* Part III.A.2.

¹²⁵ See Chiu, *supra* note 2, at 1261; Hagan, *supra* note 85, at 975–76; see also *infra* Part III.A.3.

¹²⁶ See Coker, *supra* note 14, at 850–51; see also *infra* Part III.A.4.

¹²⁷ Winick, *supra* note 24, at 72–73; see Chiu, *supra* note 2, at 1229.

¹²⁸ Winick, *supra* note 24, at 72–73.

¹²⁹ See *id.* at 72.

¹³⁰ See Coker, *supra* note 14, at 831–39; Mills, *supra* note 18, at 588–89.

¹³¹ See Mills, *supra* note 18, at 588.

¹³² *Id.*; Coker, *supra* note 14, at 831.

arrive on the scene.¹³³ Under these circumstances, police officers in a mandatory arrest jurisdiction often arrest both parties rather than determine who was the primary aggressor.¹³⁴ Such arrests can be extremely detrimental to victims of domestic violence because they hold the victim responsible for her abusive relationship.¹³⁵ Furthermore, if her conduct cannot be successfully characterized as self-defense, she might face severe consequences, regardless of the overall reality of the relationship.¹³⁶

Arrest can also have many negative effects on a battered woman with regard to her children.¹³⁷ Even if an arrested victim is eventually released without being charged, arrest can prevent her from gaining presumptive custody in some states if she later seeks to leave the abusive relationship.¹³⁸ In addition, mandatory arrest policies can expose a family to intervention by the Department of Social Services (DSS),¹³⁹ despite the injurious effect such intervention might have on the battered mother.¹⁴⁰ DSS frequently forces victims of domestic violence to choose between staying with the batterer and keeping their children.¹⁴¹ While this policy might be warranted in certain cases, it often has the effect of second guessing the survivor's best judgment about the safest solution for herself and her children. It also ignores the reality that leaving can place a domestic violence victim and her

¹³³ See Mills, *supra* note 18, at 588.

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See Coker, *supra* note 14, at 831–32. For immigrant women, conviction for domestic violence can result in deportation. *Id.* at 831. Recent immigration law has gone part way in recognizing and responding to this problem. *Id.* Current legislation allows the Attorney General to waive deportation in the case of a battered woman who can prove that she is not the primary perpetrator of violence in her relationship and that she was “acting in self-defense.” 8 U.S.C.A. § 1227(a)(7)(A)(i)(I) (2002). However, a victim may have difficulty meeting this standard if, in the case of ongoing violence, she does not meet the “self-defense” standard in a particular incident. Coker, *supra* note 14, at 831–32.

¹³⁷ See Coker, *supra* note 14, at 832, 835–36.

¹³⁸ See *id.* at 832.

¹³⁹ DSS is likely to get involved in these cases, where, as in Massachusetts, police officers are mandatory reporters. Assault or assault and battery; punishment, MASS. GEN. LAWS ch. 119, § 51A (1999). As a mandatory reporter, police officers are required by law to report to DSS any child that he/she has reasonable cause to believe “is suffering physical or emotional injury resulting from abuse inflicted upon him which harm or causes substantial risk of harm to the child’s health or welfare including sexual abuse, or from neglect” *Id.* Furthermore, some states have interpreted neglect broadly, to include cases where a child has witnessed, but not been the direct target of abuse. See DALTON & SCHNEIDER, *supra* note 2, at 292–93.

¹⁴⁰ See Coker, *supra* note 14, at 835–37.

¹⁴¹ *Id.* at 835–36.

children in far greater danger than temporarily staying.¹⁴² Critics of mandatory arrest argue that forcing such a choice too early can gravely disempower women by blaming and placing the responsibility for change on the victims rather than on the perpetrators.¹⁴³

2. Mandatory Arrest as Empowering to Victims

In contrast, there is an alternate view of mandatory arrest policies that regards these policies as empowering of domestic violence victims.¹⁴⁴ According to one analyst, "[t]he most common complaint of battered women regarding response is that the police do not do enough In fact, the strongest negative ratings of victim satisfaction with police response often come from those women who desired a *harsher* response."¹⁴⁵ This argument focuses on the notion that, historically, police officers have tended not to arrest batterers, even when victims want arrests to occur.¹⁴⁶ There is no question that failure of police officers to arrest under these circumstances trivializes the gravity of victims' concerns, places the victim in greater danger, and discourages her from calling the police in the future.¹⁴⁷

The cases most at issue in the mandatory policy debate, however, generally surround those women who urge against arrest.¹⁴⁸ Those who view mandatory arrest as empowering in these instances focus on the safety reasons that the woman might have for vocalizing a request not to arrest.¹⁴⁹ These theorists look beyond a woman's urging against arrest to the meaning behind her 911 call as the best indicator of her true wishes.¹⁵⁰ They argue that arrest in these cases best empowers a woman who has taken the step of calling the police to know that such a step will be taken seriously by law enforcement, even if she feels too threatened to directly ask for the arrest of her batterer.¹⁵¹

¹⁴² *Id.* at 835.

¹⁴³ *See id.*

¹⁴⁴ Winick, *supra* note 24, at 71.

¹⁴⁵ Coker, *supra* note 14, at 842-43.

¹⁴⁶ *See* Hagan, *supra* note 85, at 935-36.

¹⁴⁷ *See id.* at 937.

¹⁴⁸ *See* Buzawa & Buzawa, *supra* note 15, at 604.

¹⁴⁹ *See* Evan Stark, *Mandatory Arrest of Batterers, A Reply to Its Critics*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 115, 143 (Eve S. Buzawa & Carl G. Buzawa eds., 1996); Hagan, *supra* note 85, at 937.

¹⁵⁰ *See* Stark, *supra* note 149, at 143; Hagan, *supra* note 85, at 937.

¹⁵¹ *See id.* The problem with this theory is that there are many reasons that a battered woman may call the police besides seeking to have her batterer arrested. *See* Chiu, *supra* note 2, at 1230. She may only want physical or medical assistance or to have the police escort her abuser out of the residence. *Id.* Finally, this theory fails to address those cases in

3. Mandatory Arrest as a Warranted Usurpation of Control During Immediate Trauma

An alternate characterization of mandatory arrest policies acknowledges that these policies do take away a certain amount of control from the victim.¹⁵² Under this theory, however, the usurpation of control is warranted in certain instances under the empowerment model because of the immediacy of the threat and the victim's state of shock.¹⁵³ When the police respond to an incident of domestic violence in progress, their decision regarding arrest will necessarily be made at the scene and in close proximity to when the abuse took place. A victim at the scene of the crime is likely injured or traumatized from the recent violence. Under these circumstances, she may very well be incapable of determining whether she wants her batterer arrested at that time.¹⁵⁴ According to one author:

Safety and stabilization are critical at the beginning; otherwise, the battered woman will only be capable of acting as an agent within the limiting and debilitating confines of her victimization. Her efforts at moving towards desirable outcomes will only be frustrated by the uncontrollable behavior of her abuser. Once a battered woman and her children have been provided a safe and separate environment, her agency is enhanced and her victimization is reduced.¹⁵⁵

This characterization of mandatory arrest policies differentiates the circumstances in which such arrests are generally made from other stages in the law enforcement process.¹⁵⁶ At this stage, the victim is so close in time to the act of violence that, even under the empowerment model, it would probably not be appropriate to cede to her wishes at that time.¹⁵⁷ Instead, a mandatory arrest policy is appropriate because it requires responding officers to arrest the perpetrator in order to create a safe environment for the victim to recover physically and emotionally and to plan her next steps.¹⁵⁸

which the woman never called the police, but where the call was placed by a neighbor, child, or other family member. *Id.*

¹⁵² See Hagan, *supra* note 85, at 975.

¹⁵³ See *id.* at 975-76; Chiu, *supra* note 2, at 1261.

¹⁵⁴ See Chiu, *supra* note 2, at 1261.

¹⁵⁵ *Id.*

¹⁵⁶ See Hagan, *supra* note 85, at 975-76.

¹⁵⁷ See *id.*

¹⁵⁸ *Id.*; see Winick, *supra* note 24, at 71-72.

4. Mandatory Arrest as Neither Empowering Nor Disempowering

A final theory characterizes arrest as a stage in the criminal system solely between the perpetrator and the state, with no victim involvement. Unlike the prior theories, this theory rejects the notion that mandatory arrest policies remove choice and autonomy from the victim by claiming that this choice never belonged to the victim in the first place.¹⁵⁹ This theory directly criticizes the tendency of law enforcement to address only public wrongs while ignoring crimes committed in the private sphere and failing to acknowledge that “private” crimes are still crimes against the state.¹⁶⁰ Once the police have found probable cause from evidence of injury, the state of the home, or neighbor testimony, the police then have a public safety obligation to arrest the abuser, just as they would in the case of a public crime.¹⁶¹

Furthermore, the victim need not even make a statement, because probable cause can be found on the basis of other evidence.¹⁶² This arrest sends the message to the perpetrator that, regardless of what the victim herself might tolerate, domestic violence is wrong and will not be tolerated by the state.¹⁶³ Because such an arrest would surely occur as a result of an act of violence occurring in public, mandatory arrest ensures that the location of violence in the home can no longer serve as a buffer against accountability.¹⁶⁴

5. Analysis

At first glance, mandatory arrest appears to be a disempowering policy in that arrest is required regardless of victim preferences.¹⁶⁵ A closer analysis, however, reveals two reasons why mandatory arrest policies are not necessarily disempowering to victims after all.¹⁶⁶ First,

¹⁵⁹ See Coker, *supra* note 14, at 850–51.

¹⁶⁰ See *id.* at 850–51; Ciraco, *supra* note 19, at 176. A study published in 1996 demonstrates the disparate treatment by the police of “public” and “domestic” crimes. See Eve Buzawa, et al., *The Role of Arrest in Domestic Versus Stranger Assault: Is There a Difference? Do Arrests and Restraining Orders Work?*, in BATTERED WOMEN AND THE LAW, *supra* note 1, at 591–92. When several variables were held constant, including the presence of a weapon, the presence of the perpetrator at the scene, and the seriousness of the victim’s injuries, this study found that arrest was twice as likely in stranger assault as in domestic assault. *Id.*

¹⁶¹ Ciraco, *supra* note 19, at 176.

¹⁶² See Chiu, *supra* note 2, at 1230.

¹⁶³ See Coker, *supra* note 14, at 850–51.

¹⁶⁴ See *id.*

¹⁶⁵ Winick, *supra* note 24, at 72–73; see Chiu, *supra* note 2, at 1229.

¹⁶⁶ See *infra* Parts III.A.3, III.A.4.

a victim is likely to be in shock when the decision to arrest is made.¹⁶⁷ During, and only during, the specific, limited time that the victim is in pain and in the presence of her batterer in their home following the violent incident, it cannot be assumed that she is capable of making a rational decision concerning her relationship with her batterer.¹⁶⁸ Arrest does not necessarily mean that prosecution will occur. Even without prosecution, arrest provides a victim with time and temporary safety to recover from the abuse and to think through her situation outside of the threatening presence of her batterer.¹⁶⁹ In this short period of reprieve, the police can connect the victim with an advocate and with resources, so that she can make future choices based on an educated understanding of her options.¹⁷⁰

Another reason why mandatory arrest does not necessarily disempower is that it does not necessarily involve the victim.¹⁷¹ While the victim may have phoned the police and may choose to make a statement against her abuser, mandatory arrest policies do not require that she do so.¹⁷² Rather, a lawful arrest is based on the observations of the police upon their arrival at the scene of the alleged crime.¹⁷³ It is vital that the police act on these observations in homes with the same seriousness that they act on observations of crimes occurring outside the homes, independent of victim testimony or cooperation.¹⁷⁴

In conclusion, while not always empowering, mandatory arrest policies are not necessarily disempowering, because they respond only to an immediate threat of violence, where probable cause is observed first hand by the police.¹⁷⁵ Furthermore, mandatory arrest policies increase the likelihood that survivors will be able to make informed decisions later on, once they have had a chance to recover from the immediate instance of violence.¹⁷⁶

After arrest, prosecution is the next stage in the criminal process. Here the challenge for prosecutors shifts from determining whether there is probable cause that domestic violence occurred to proving

¹⁶⁷ See Gondolf & Fisher, *supra* note 3, at 115; Winick, *supra* note 24, at 81.

¹⁶⁸ See Chiu, *supra* note 2, at 1261.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 1230.

¹⁷² See Mills, *supra* note 18, at 558.

¹⁷³ DALTON & SCHNEIDER, *supra* note 2, at 594.

¹⁷⁴ See Coker, *supra* note 14, at 850-51.

¹⁷⁵ See Hagan, *supra* note 85, at 975-76.

¹⁷⁶ See *id.*

the crime beyond a reasonable doubt. Because the victim of violence might be the only witness to the crime, her involvement becomes important to prosecutors as they seek convictions.

B. No-drop Prosecution Policies

In general, a no-drop prosecution policy is one in which the state prosecutor decides whether to prosecute a domestic violence perpetrator, regardless of the victim's wishes.¹⁷⁷ These policies range from strict or "hard" no-drop policies to highly deferential policies.¹⁷⁸ A "hard" no-drop policy is one in which the state will push forward a prosecution using all means available.¹⁷⁹ In addition to submitting into evidence the testimonies of police officers and neighbors and excited utterances made by the victim at the time of the alleged attack, prosecutors in these jurisdictions might subpoena a victim to testify against her will.¹⁸⁰ Prosecutors may go so far as to arrest or even imprison victims who fail to comply with their subpoenas.¹⁸¹ On the other end of the spectrum, deferential drop jurisdictions defer completely to the wishes of the victims, routinely dropping charges according to victim desires.¹⁸²

While "hard" no-drop prosecution is most notorious for coercing the participation of victims,¹⁸³ these policies also include efforts to prosecute that do not involve the victim, such as encouraging meticulous fact finding by police officers and the submission of excited utterances at the trial.¹⁸⁴ For the purposes of analyzing the empowering or disempowering nature of "hard" no-drop prosecution, the policy will only be examined to the extent that victims are forced or coerced to cooperate in the prosecution of their batterers. These "victim-coercive"¹⁸⁵ no-drop policies are justified by advocates on many grounds.¹⁸⁶ The following three justifications will be addressed below:

¹⁷⁷ See Mills, *supra* note 18, at 561.

¹⁷⁸ See Kirsch, *supra* note 5, at 386.

¹⁷⁹ Chiu, *supra* note 2, at 1231.

¹⁸⁰ See *id.*

¹⁸¹ *Id.*

¹⁸² See Kirsch, *supra* note 5, at 386.

¹⁸³ See Chiu, *supra* note 2, at 1231.

¹⁸⁴ DALTON & SCHNEIDER, *supra* note 2, at 627; Gwinn & O'Dell, *supra* note 17, at 627.

¹⁸⁵ To avoid confusing the overall components of a "hard" no drop policy with the specific aspect of victim coercion that will be discussed here, this Note will refer to "victim-coercive" no-drop policies in the subsequent discussion.

¹⁸⁶ See Kirsch, *supra* note 5, at 408; Jones, *supra* note 22, at 633-35; Kalyani Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L.

the "good of society," victim safety, and the emotional empowerment of victims.

The first argument attempts to justify victim-coercive no-drop policies on the grounds that they serve the general state interest of ending abusive relationships¹⁸⁷ and because they encourage equality between men and women.¹⁸⁸ Thus, the sacrifice of individual victim interests are regarded by these proponents as necessary for overall societal change.¹⁸⁹

The validity of this society-based rationale is called into question, however, to the extent that victim coercion by the state mimics the same kind of terrorizing power and control used by the abuser.¹⁹⁰ Despite the fact that victims often choose not to testify out of a genuine fear for their safety,¹⁹¹ extremely coercive policies actually permit prosecutors to throw an uncooperative victim in jail for failure to answer a subpoena to testify.¹⁹² Here, the state uses the general notion of the "good of society" as justification to employ tactics of coercion like those used by the batterer to force compliance from an already victimized citizen.¹⁹³ Surely the "good of society" is itself damaged when society's most vulnerable members come to regard the state with even more fear and mistrust than they regard their abusive partners.¹⁹⁴ Hence, victim-coercive no-drop policies cannot be justified solely by the argument that they protect the supposed best interests of society at large.

A second argument in favor of victim-coercive policies focuses on the supposed safety needs of the victims.¹⁹⁵ This theory recognizes the power and control dynamics intrinsic in an abusive relationship,¹⁹⁶ but argues that domestic violence victims are incapable of making their

REV. 205, 220 (1999); Vilhauer, *supra* note 103, at 961-62; Hagan, *supra* note 85, at 978; *see also infra* Part III.B.1-3.

¹⁸⁷ Jones, *supra* note 22, at 633-34.

¹⁸⁸ *See* Robbins, *supra* note 186, at 207. Robbins refers to, "the larger social costs of domestic violence, which involve, inter alia, the societal subordination of women. Each time a man hits a woman and gets away with it, *all* women suffer, both from the risk of harm that has not been prevented, and from the retardation of the movement toward societal equality." *Id.* (citation omitted).

¹⁸⁹ Hanna, *supra* note 15, at 626.

¹⁹⁰ *See* Mills, *supra* note 18, at 591.

¹⁹¹ *See* Adams, *supra* note 36, at 23.

¹⁹² *See* Kirsch, *supra* note 5, at 402-04.

¹⁹³ *See* Mills, *supra* note 18, at 591.

¹⁹⁴ *See id.*

¹⁹⁵ *See id.* at 564.

¹⁹⁶ *See* Mills, *supra* note 18, at 583.

own decisions because of the totality of the abuser's control.¹⁹⁷ The state is thus justified in forcing prosecution because of the "saving" effect that prosecution is presumed to have.¹⁹⁸

The problem with this argument is that it is based on a false assumption that prosecution is necessarily the "best" or safest solution for the victim.¹⁹⁹ This overly optimistic view of prosecution ignores the continued access that the batterer often has to his victim during the pending trial, the reality that most offenders plead guilty to the charges to get probation, and the fact that jailed batterers usually receive relatively short sentences.²⁰⁰ Given the reality that even aggressive prosecution will likely yield only a mild, if any, punishment, there are many reasons why a victim might be far safer by not aligning herself with the state.²⁰¹ The following passage aptly describes the uncertain reality of prosecution:

Prosecution . . . is no guarantee that the violence will stop. A woman who opposes prosecution is taking a calculated risk, as is the woman who actively pursues prosecution. Neither she, nor the judge or the prosecutor, can know with certainty which action will result in less violence. The problem is not that the batterer's coercion is not real, but rather that it is not always clear that the criminal justice system offers a better alternative.²⁰²

Recent studies further support this analysis of prosecution.²⁰³ These studies have found that prosecution had no effect on the likelihood of re-arrest of the batterer within a six month period,²⁰⁴ further calling into question the argument that state control benefits the victim.²⁰⁵

¹⁹⁷ See Robbins, *supra* note 186, at 218–19.

¹⁹⁸ See *id.* at 219.

¹⁹⁹ Coker, *supra* note 14, at 826.

²⁰⁰ MILLS, *supra* note 41, at 56. In one survey, only 1% of domestic violence perpetrators received jail time beyond time served at arrest. *Id.*

²⁰¹ See MASS. GEN. LAWS ch. 265, § 13(A) (2000).

²⁰² Coker, *supra* note 14, at 826.

²⁰³ See Mills, *supra* note 18, at 567–68.

²⁰⁴ *Id.* Another study found that a battered woman who chose to go forward with pressing charges in a jurisdiction where she was not compelled to do so was at a lower risk for subsequent abuse than a victim who was coerced or forced into cooperating with prosecution efforts through no-drop policies. *Id.* at 567. The researchers surmised that the prevention of future abuse, therefore, had some relationship to the extent that victims exercised a measure of "power" in the legal process. *Id.*

²⁰⁵ See *id.* at 568.

A third argument in favor of victim-coercive no-drop policies contends that they actually empower the victim psychologically.²⁰⁶ Proponents of this theory argue that a victim can be empowered through the process of prosecuting her batterer in a court of law.²⁰⁷ Here, the ends (the supposed "empowerment" of a victim through the process of participating in the prosecution of her abuser) are used to justify the means (compelling or coercing victim participation).²⁰⁸

This argument is also seriously flawed.²⁰⁹ First, the theory misuses the term "empowerment" as it is understood in domestic violence literature.²¹⁰ This theory views the "empowerment" of a victim as an end result that justifies a coercive process.²¹¹ Advocates of the empowerment model, however, never intended empowerment to be a result gained at all costs.²¹² Instead, empowerment is a *process* of encouraging and facilitating a victim's own decision-making, and it is through this process that the victim has the best chance to realize personal autonomy.²¹³

A second fatal flaw in this theory is that, even if the end result of "empowerment" is a worthy goal, there is no evidence that victims are actually "empowered" as a result of the policy.²¹⁴ Instead, revictimization is a widely documented result of forced victim participation.²¹⁵ Disempowerment as a direct result of victim coercive policies can occur in a number of ways.²¹⁶ In a worst case scenario, an uncooperative victim will change her original story when she testifies on the stand to protect her partner.²¹⁷ The prosecutor will then impeach the victim's testimony through various efforts, such as submitting excited utterances or prior inconsistent statements made by the victim or submitting expert testimony as to why such inconsistency is common in domestic violence victims.²¹⁸ Hence the victim is disempowered on a

²⁰⁶ See Robbins, *supra* note 186, at 218; Vilhauer, *supra* note 103, at 961.

²⁰⁷ Robbins, *supra* note 186, at 218.

²⁰⁸ See Vilhauer, *supra* note 103, at 961.

²⁰⁹ See Kirsch, *supra* note 5, at 418.

²¹⁰ Kanter & Enos, *supra* note 23, at 166.

²¹¹ See Vilhauer, *supra* note 103, at 961-62.

²¹² Kanter & Enos, *supra* note 23, at 166.

²¹³ *Id.*

²¹⁴ See Kirsch, *supra* note 5, at 416-17, 418; Mills, *supra* note 18, at 590; Winick, *supra* note 24, at 84.

²¹⁵ Winick, *supra* note 24, at 84.

²¹⁶ See Kirsch, *supra* note 5, at 418; Mills, *supra* note 18, at 590.

²¹⁷ See Mills, *supra* note 18, at 590.

²¹⁸ *Id.*

number of levels.²¹⁹ First she is disempowered by being forced to testify.²²⁰ Secondly, she is disempowered through the impeachment process that brands her a liar or incompetent to speak in the public forum of a courtroom.²²¹ Coerced participation perpetuates both the emotional trauma that the victim has suffered at the hands of her abuser²²² and her already low self esteem by bolstering the notion that she is incompetent and without control.²²³

From the perspective of victim empowerment, all three arguments in favor of victim-coercive no-drop prosecution are critically flawed.²²⁴ Efforts to force victim participation for physical safety or emotional empowerment simply do not hold up against the reality of victims' experiences.²²⁵ Furthermore, a policy with the potential to inflict serious damage on victims for the "good of society" should raise serious additional concerns.

IV. ALTERNATIVES TO MANDATORY ARREST AND NO-DROP POLICIES THAT MAXIMIZE CRIME CONTROL AND VICTIM EMPOWERMENT

Mandatory arrest and no-drop prosecution policies represent two extreme approaches currently taken by several states in an effort to "get tough" on domestic violence. These approaches focus more on punishing the perpetrator than on meeting the needs of victims in cases of domestic violence. It is therefore worth considering whether there are alternatives to these extreme policies that balance the goal of crime control with the need to empower victims of abuse.

A. *Presumptive Arrest*

Presumptive arrest is an alternative policy,²²⁶ regarded as an optimal compromise among the various conflicting theories of arrest in

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Winick, *supra* note 24, at 84.

²²³ Kirsch, *supra* note 5, at 418.

²²⁴ See *supra* Parts III.B.1-3.

²²⁵ See Kanter & Enos, *supra* note 23, at 166.

²²⁶ The terms "preferred" and "presumptive" are used interchangeably by different legal analysts to describe the same policy. See Winick, *supra* note 24, at 83; Hagan, *supra* note 85, at 976. This Note refers to the policy as "presumptive" arrest, simply because this term begins with the assumption that an act of violence against another ought to be punished, with exceptions limited to exceptional circumstances that would render the arrest counterproductive to the goals it is intended to obtain.

cases of domestic violence.²²⁷ Presumptive arrest resembles mandatory arrest in that police officers answering domestic violence calls are generally required to arrest the perpetrator, where there is probable cause.²²⁸ In a presumptive arrest jurisdiction, however, the police officer maintains a small degree of discretion not to arrest a perpetrator when there are certain countervailing considerations urging against arrest.²²⁹ These countervailing considerations will most likely come from the expressed wishes of the victim and her analysis of what will keep her safe.²³⁰

The strength of the presumptive arrest approach is in its balance.²³¹ The strong presumption that arrest is the appropriate response to cases of domestic violence demonstrates that the state is as concerned with these crimes as it is with crimes that occur in the public sphere.²³² However, the discretion authorized by the policy recognizes the unique difficulties presented in cases of intimate abuse.²³³ The small window of discretion allows the police to tailor its response to the specific circumstances or wishes of each victim in each case.²³⁴ Nonetheless, discretion is held by the police officer, who makes the final decision.²³⁵ This is appropriate at the scene of the crime, where danger may be so imminent that efforts to empower the victim to make her own decisions would be completely overshadowed by the disempowering presence of the batterer or the incident of violence itself.²³⁶

Critics of presumptive arrest policies argue that granting any discretion to police officers will result in that discretion being exercised too liberally, and that domestic violence will be taken less seriously by law enforcement in general.²³⁷ To respond to this concern, presumptive arrest jurisdictions should incorporate the following two suggestions into their policies. First, in order for police to exercise their discretion in a way that is beneficial to domestic violence victims, these officers must receive comprehensive training regarding the dynamics

²²⁷ See Winick, *supra* note 24, at 80.

²²⁸ See *id.* at 83.

²²⁹ *Id.* at 83; Hagan, *supra* note 85, at 976.

²³⁰ Winick, *supra* note 24, at 83; Hagan, *supra* note 85, at 976.

²³¹ See Winick, *supra* note 24, at 80, 84.

²³² See Coker, *supra* note 14, at 850-51.

²³³ See Winick, *supra* note 24, at 80.

²³⁴ See *id.* 80-81.

²³⁵ Hagan, *supra* note 85, at 976.

²³⁶ See *id.* at 975-76.

²³⁷ See Winick, *supra* note 24, at 91.

of intimate partner abuse.²³⁸ Only when they truly understand these complex dynamics will police officers be equipped to exercise their discretion in a way that best meets the needs of victims and society.²³⁹ Second, police discretion not to arrest should be further checked by requiring written findings when this discretion is exercised.²⁴⁰ These written findings should highlight the reasons why the officer decided not to arrest in the face of probable cause of domestic violence, focusing on the impact that arrest would have on the victim.²⁴¹ This requirement would permit supervisory review of how individual officers are exercising their discretion in the field.²⁴² Under these two conditions, a presumptive arrest policy will best serve the interest of victims and society alike.²⁴³

B. *Non-Coercive No-drop Prosecution*

The preceding discussion of victim-coercive no-drop policies clearly established that these policies are problematic from the perspective of victim empowerment.²⁴⁴ As with mandatory arrest policies, however, there is potential for a compromise that seeks to both empower victims and bring perpetrators to justice.²⁴⁵ There are many possible variations of this compromise solution, but essentially they all strive to diligently prosecute whenever this can be accomplished without disempowering the victim.²⁴⁶ A good compromise no-drop policy must not force a victim to participate in the trial in any way against her will or better judgment.²⁴⁷ These policies will be referred to as non-coercive no-drop policies.

Non-coercive no-drop policies should be carefully distinguished from policies of complete deference.²⁴⁸ Deferential policies allow the woman, rather than the prosecutor, to make the ultimate decision as to whether the defendant will be prosecuted at all.²⁴⁹ In contrast, in a non-coercive no-drop jurisdiction, a victim only has decision-making

²³⁸ See Hagan, *supra* note 85, at 977.

²³⁹ See *id.*

²⁴⁰ See Winick, *supra* note 24, at 83.

²⁴¹ *Id.*

²⁴² See *id.*

²⁴³ See *id.* at 84.

²⁴⁴ See *supra* Part III.B.

²⁴⁵ See Coker, *supra* note 14, at 843–44.

²⁴⁶ See *id.* at 843.

²⁴⁷ See Mills, *supra* note 18, at 556–57.

²⁴⁸ See Kirsch, *supra* note 5, at 386–87.

²⁴⁹ See *id.*

authority over the extent of *her own* participation in the prosecution.²⁵⁰ The prosecutor still makes the final decision as to whether prosecution will proceed, with or without the victim.²⁵¹

Non-coercive policies prosecute through the use of any and all evidence of abuse that exists, aside from the testimony of the victim.²⁵² Testimony of police officers, family members, and neighbors as to the state of the defendant, victim, and the home; photographs of physical injuries and property damage; medical records; audio tapes of emergency 911 calls; and excited utterances are all examples of evidence that might suffice to convict a particular defendant, even where the victim is unwilling to take the stand.²⁵³

Where there is evidence of abuse, besides the testimony of an unwilling victim, that can be admitted in court, prosecutors should attempt to prosecute perpetrators of domestic violence based on that outside evidence.²⁵⁴ The police must be trained to investigate domestic violence crimes with the same scrutiny that they employ in homicide cases, where it is known from the outset that the victim will be unavailable to testify.²⁵⁵ This approach to domestic violence cases will maximize the number of perpetrators who can be brought to justice without incurring the disempowering and revictimizing effects of a forced victim testimony.²⁵⁶

Although external evidence is the cornerstone of non-coercive policies, there are numerous additional approaches that have been adopted by various jurisdictions.²⁵⁷ Some policies allow a victim to withdraw her cooperation only after she watches a video or talks with a victim witness advocate about the cycle of domestic violence²⁵⁸ and about resources available to her through the criminal justice system and the domestic violence victim-support community, so that her de-

²⁵⁰ See *id.*

²⁵¹ Chiu, *supra* note 2, at 1231.

²⁵² See Gwinn & O'Dell, *supra* note 17, at 628.

²⁵³ Chiu, *supra* note 2, at 1231. According to one San Diego prosecutor, "[a]bout 60% of our cases are provable without the victim based on 911 tapes, photographs, medical records, spontaneous declarations by the victim to the officers, admissions by the defendant, neighbors' testimony, relatives' testimony, and general police officer testimony related to the case and the subsequent investigation." Gwinn & O'Dell, *supra* note 17, at 627.

²⁵⁴ Robbins, *supra* note 186, at 222.

²⁵⁵ See Richard Devine, *Targeting High Risk Domestic Violence Cases: The Cook County, Chicago, Experience*, 34 THE PROSECUTOR 30 (Apr. 2000); Mills, *supra* note 18, at 561.

²⁵⁶ See DALTON & SCHNEIDER, *supra* note 2, at 633, n.2.

²⁵⁷ See Coker, *supra* note 14, at 843.

²⁵⁸ See generally Walker, *supra* note 50.

cision to withdraw is an educated one.²⁵⁹ Interestingly enough, prosecutors and judges have noted that the time invested by the criminal justice community in counseling a victim and in really listening to and sympathizing with her needs and concerns often results in an increased willingness of victims to voluntarily cooperate with the prosecution of her abuser.²⁶⁰ In this way, a policy that emphasizes victim empowerment might actually yield better victim cooperation for crime control agencies.²⁶¹

For all of the above reasons, prosecution offices around the country should continue to bolster non-coercive no-drop policies with creative approaches²⁶² that balance crime control and victim interests. Prosecution of a batterer should be sought whenever possible, so long as the victim is permitted to determine her own level of participation in the process.²⁶³

CONCLUSION

From the perspective of crime control, mandatory arrest and no-drop prosecution policies are accurately seen as complementary.²⁶⁴ Police may feel less inclined to arrest where the arrest is not augmented by forceful prosecution.²⁶⁵ In the same vein, pro-prosecution analysts view arrest that is not followed up by prosecution as insufficient to deter future violence.²⁶⁶ This Note, however, aims to shift the focus from perpetrator to victim. From the perspective of the victim, it makes sense to consider mandatory arrest and no-drop policies separately because of the different purposes that each policy serves.

²⁵⁹ See Coker, *supra* note 14, at 843.

²⁶⁰ Kirsch, *supra* note 5, at 399.

²⁶¹ See *id.*

²⁶² See Devine, *supra* note 255, at 30–31. As one example of a “creative approach,” the Cook County District Attorney’s Office in Illinois has employed a program that targets the most serious cases of domestic violence for intense prosecution. *Id.* Rather than using the threats of subpoenas and jail time to force victim participation, the office uses incentives to encourage victim cooperation. *Id.* These incentives come in the form of an attractive package of coordinated on-site community services, which work together to come up with both a personal criminal and civil plan for each victim that uses state funded resources to facilitate the development of a new life for the victim away from the abuser. *Id.* Another example of a creative alternative to victim-coerced no-drop policies is a strategy of deferring prosecution where the district attorney’s office can extract certain agreements from the batterer to seek treatment within the time of the deferment. Kirsch, *supra* note 5, at 389–91.

²⁶³ See DALTON & SCHNEIDER, *supra* note 2, at 633.

²⁶⁴ See *id.*

²⁶⁵ Ciraco, *supra* note 19, 180–82.

²⁶⁶ Chiu, *supra* note 2, at 1230.

Mandatory arrest serves the immediate safety interests of the victim, at a minimum, providing a short period of separation and safety from the batterer so that the victim can evaluate her options.²⁶⁷ Prosecution, on the other hand, while it may or may not enhance victim safety, aims primarily to hold perpetrators accountable for their criminal actions.²⁶⁸ It is important to recognize the distinct purposes of these two stages in the process so as to uphold the strengths in each policy while simultaneously attacking those elements that are problematic. An optimal policy arrangement need not choose between victim empowerment or crime control, but will combine components of each approach into arrest and prosecutorial policies that both empower victims and hold perpetrators accountable.

The primary interests of police officers and prosecutors are couched, respectively, in terms of "public safety" and "the public interest." However, both public actors must remember that domestic violence victims, unlike victims of many other crimes, are likely to be targeted for abuse again and again, often with increasing severity.²⁶⁹ Greater abuse is often perpetuated by certain types of state intervention. Hence, in the context of domestic violence, the victims are the members of the public most in need of police and prosecutorial responsiveness and sensitivity.²⁷⁰ A conscientious law enforcement officer must be able to gauge those individual circumstances under which arrest might place a victim in greater danger.²⁷¹ Likewise, a conscientious prosecutor must appreciate that prosecution that forces victim cooperation might further endanger the victim, violating the responsibility that the prosecutor has to the public interest.²⁷²

One important component of a victim-centered approach to justice is the recognition that mandatory policies are problematic in their lack of flexibility.²⁷³ Giving law enforcement the discretion to tailor responses to individual victim needs necessitates, however, that police and prosecutorial staff be well-trained and sensitive to the

²⁶⁷ Hagan, *supra* note 85, at 975.

²⁶⁸ SCHNEIDER, *supra* note 13, at 185-86.

²⁶⁹ Vilhauer, *supra* note 103, at 961.

²⁷⁰ See *id.* Sometimes perpetrators threaten violence against a victim's loved ones if the victim does not accede to his demands. *Id.* at 958-59. In this case, the victim's knowledge and wishes regarding her situation could have even more widespread significance for the public interest. See *id.*

²⁷¹ See Winick, *supra* note 24, at 75-76; Hagan, *supra* note 85, at 977.

²⁷² Vilhauer, *supra* note 103, at 958-59.

²⁷³ See Kirsch, *supra* note 5, at 426; Winick, *supra* note 24, at 75-76.

unique issues surrounding domestic violence.²⁷⁴ Absent this training, there is a real danger that too much discretion will be ceded to victims in cases where arrest and prosecution could proceed against a defendant without the victim's cooperation.²⁷⁵

Along with enhanced training on the dynamics of domestic violence, law enforcement personnel should also become increasingly knowledgeable about the array of community-based resources and services available to battered women and men.²⁷⁶ A "coordinated community response" can link the array of domestic violence services,²⁷⁷ making them more easily accessible to victims. Such an approach recognizes that victims have needs that are not only legal but also medical, financial, educational, emotional, and social.²⁷⁸ By creating contacts with existing non-legal services, the criminal justice system can continue to focus its resources on legal objectives. The non-legal community is an important resource that can assist police and prosecutors in tailoring their own responses to the particular needs and situations of battered women.

Mandatory arrest and no-drop prosecution policies demonstrate the progress that law enforcement has made in recognizing domestic violence as a crime that warrants societal outrage and batterer accountability. The focus that each policy places on victim safety, although naïve to the greater danger that state intervention may create, is commendable at least in intent. If immediate safety or even saving lives are the only goals of the criminal justice system, however, then these goals are far too limited. The goal of every advocate in the fight against domestic violence must not end at the saving of a life, but must, more importantly, empower lives worth living.²⁷⁹

²⁷⁴ See Hagan, *supra* note 85, at 977.

²⁷⁵ See *id.*

²⁷⁶ See Coker, *supra* note 14, at 845.

²⁷⁷ *Id.* Such services include emergency housing, legal advocacy, support groups, and financial resources for battered women. *Id.*

²⁷⁸ See *id.*

²⁷⁹ See Mills, *supra* note 18, at 610.

